

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARY CHANDLER AND MICHAEL
CHANDLER, husband and wife,

Plaintiffs,

v.

GREENSTONE LTD., et al.

Defendants.

Case No. 04-1300RSL

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTIONS *IN LIMINE* NOS. 13 AND 14,
REGARDING IRRELEVANT RISK
FACTORS OF "CAUSES" OF BREAST
CANCER, AND FAMILY HISTORY.**

Motion No. 13: Irrelevant Risk Factors or "Causes" of Breast Cancer

Defendants want to ask the jury to speculate about other causes of plaintiff's breast cancer, but not one of their experts has expressed the opinion that other risk factors played any role whatsoever in the development of plaintiff's breast cancer. Defendants have designated four experts on case specific causation. One of them, Dr. Sickles, a radiologist, offers no causation opinion at all. The other three all state in their reports that no one knows the cause of any breast cancers.

Dr Lowell Rogers, a pathologist, opines: "there is no generally accepted way to determine the cause or causes of most breast cancers. . . . There is too much we do not know

1 about this heterogeneous and multi-factorial disease.”¹

2 Dr Barbara Levy, an ObGyn, states: “It is impossible to determine whether or to what
3 extent any of these risk factors, or other unidentified risk factors, played a role in the
4 development or progression of Ms Chandler’s breast cancer.”²

5 Dr Lisa Bailey, a surgeon, likewise asserts: “there is no generally accepted methodology
6 that can be used to determine the cause of breast cancer in an individual woman.”³ In her
7 deposition, Dr. Bailey also admitted there was no way for her to say that any risk factor or
8 combination of risk factors were causal:

9 Q. I take it what you're telling me is that
10 there is nothing in the medical records that you
11 could imagine that could change your mind? I mean
12 is there anything that you could look for to find,
13 in a set of medical records in a woman with breast
14 cancer who has taken hormone replacement therapy,
that would make it probable that the hormone
replacement therapy had contributed to the growth of
that cancer?

15 A. Well, we have -- we have no way of knowing
16 in any individual patient what exactly contributed
17 to the breast cancer because we don't know all the
18 potential causes of a breast cancer.
19 I do review the records in detail, as I do
for any of my patients, to look at their history and
their physical exam and what type of cancer and all
of their different risk factors.

20 Q. So what would you look for if you were
21 trying to find evidence that hormone replacement
22 therapy had contributed to the growth of a woman's
breast cancer?

23 MS. HAMADA: Object to form.

24 _____
25 ¹ Ex. 01, Rogers Report at page 2.

26 ² Ex. 02, Levy Report at page 4.

³ Ex 03, Bailey Report at page 2.

1 THE WITNESS: There isn't any particular
2 type of breast cancer or form that it takes that
3 would tell anybody whether any particular risk
4 factor contributed to a woman's breast cancer.⁴

5 Defendants simply have no factual basis for these opinions. Under Washington law,
6 “[e]xpert testimony is required to establish causation when an injury involves obscure medical
7 factors that would require an ordinary lay person to speculate or conjecture in making a finding.
8 *Bruns v. PACCAR*, 77 Wash. App. 201, 214-15, 890 P.2d 469, 477 (1995). Less certain
9 evidence such as “might, could or possibly,” is not helpful to the jury because it is speculative.
10 *Id.*, 77 Wash. App. At 215, 890 P.2d at 477. Moreover, Rule 702 and *Daubert* hold that the
11 proponent of scientific evidence bears the burden of establishing that the evidence rests on a
12 valid foundation. *Daubert v. Merrell Dow Pharms., Inc.*, (“*Daubert II*”) 43 F.3d, 1311, 1316
13 (9th Cir. 1995). Without expert testimony, evidence “other possible causes” is irrelevant,
14 speculative and unreliable.

14 **Motion No. 14: Family History of Unrelated Cancers**

15 Defendants also want to ask the jury to speculate about one potential other “cause” of
16 plaintiff’s breast cancer. Specifically, they will point to Mrs. Chandler’s remote and vague
17 family history concerning the possible, but unconfirmed “abdominal” cancer of her mother.
18 Plaintiffs’ Reply in Support of Motion *in Limine* No. 13 above spells out the admissions of all
19 defendants’ experts that no cause of Ms. Chandler’s breast cancer is known or even could be
20 known, which of course, includes this family history evidence.

21 Indeed, Dr Levy explicitly includes “remote family history” among the other risk factors
22 about which she admits: “It is impossible to determine whether or to what extent any of these
23 risk factors, or other unidentified risk factors, played a role in the development or progression of
24 Ms Chandler’s breast cancer.”⁵

25 ⁴ Ex 04, Bailey Deposition Tr. 8:2-9:2 (July 5, 2011)

26 ⁵ Ex 02, Levy Report at page 4.

1 There is no foundation for defendants' claims. This evidence is precisely the type of
2 speculative junk science *Daubert* intended to exclude.

3 Dated: September 20, 2011.

4 Respectfully submitted,

5 By: s/Michael L. Williams

Michael L. Williams, OSB No. 784260
Leslie W. O'Leary, OSB No. 990908
WILLIAMS LOVE O'LEARY & POWERS, P.C.
9755 SW Barnes Road, Suite 450
Portland, OR 97225-6681
Telephone: (503) 295-2924
Facsimile: (503) 295-3720
Email: mwilliams@wdolaw.com
loleary@wdolaw.com

10 By: s/ Lance Palmer

Lance Palmer, WSBA 18141
Kraft Palmer Davies PLLC
1001 4th Ave, Suite 4131
Seattle, WA 98154
Telephone: (206) 624-8844
Fax: (206) 624-2912
Email: lep@admiralty.com

15 Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 20th of September, 2011, a copy of the foregoing document was served according to this Court's provision for service as set forth in the pretrial orders via ECF notification:

Darolyn Yoshie Hamada, Esq.
dhamada@shb.com
Shooke Hardy & Bacon
5 Park Plaza Suite 1600
Irvine, CA 92614-2546

Adrienne D. Gonzalez, Esq.
agonzalez@kayescholer.com
Kaye Scholer (NY)
425 Park Ave.
New York, NY 10022

Julie Belezzuoli, Esq.
julie.belezzuoli@kayescholer.com
Kaye Scholer
1999 Avenue of the Stars Suite 1700
Los Angeles, CA 90067-6048

Wendy S. Dowse, Esq.
wdowse@kayescholer.com
Andrew K. Solow
asolow@kayescholer.com
Kaye Scholer LLP
425 Park Avenue
New York, NY 10022-3598

Kathy A. Cochran
Cochran@wscd.com
Wilson Smith Cochran Dickerson
901 Fifth Ave., Suite 1700
Seattle, WA 98164

Heidi K. Hubbard, Esq.
hhubbard@wc.com
Williams & Connolly LLP
725 Twelfth St NW
Washington, DC 20005-5901

Pamela Yates, Esq.
pyates@kayescholer.com
Kaye Scholer LLP
1999 Avenue of the Stars, Suite 1700
Los Angeles, CA 90067-6048

Attorney for defendants

Attorneys for Defendants

By: /s/ Michael L. Williams

Michael L. Williams, OSB No. 784260
Leslie W. O'Leary, OSB No. 990908
WILLIAMS LOVE O'LEARY & POWERS, P.C.
9755 SW Barnes Road, Suite 450
Portland, OR 97225-6681
Telephone: (503) 295-2924
Facsimile: (503) 295-3720
Email: mwilliams@wdolaw.com
loleary@wdolaw.com